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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 848.

NICK C. SPANOS, *Petitioner*,

vs.

GILBERT CARTER, TRUSTEE, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GILBERT CARTER, Trustee,
223½ West Cherry Street,
Nevada, Missouri,
Respondent.

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NATURE OF THE CASE.

The petition does not disclose any "special and important reasons" for review on writ of certiorari, as required by Rule 19. This is not a case involving principles the settlement of which is of importance to the public as distinguished from the parties only, *Rice* v. *Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897. It is a rare and purely episodic case instituted on behalf of two lawyers against their erstwhile client seeking an increase in attorneys' fee, over and above the amount of $196,602.57 conceded by the client, and involving the construction and application of a special contract of employment.

THE ALLEGED CONFLICT OF DECISIONS.

Petitioner seeks to create the illusion of a conflict between the decision in this case and that of the 9th Circuit in another case on the same matter, namely, construction and application of that portion of Rule 52 (a) of the Federal Rules of Civil Procedure treating of the setting aside of findings of fact in non-jury or jury-waived cases. In the instant case the Court of Appeals did not even discuss the "clearly erroneous" feature of Rule 52 (a), so it hardly could be considered that its decision was inconsistent with any other decision on that subject.

Petitioner, at page 13 of the petition, dwells upon an alleged conflict between decisions in the 3rd and 5th Circuits and those of the 9th Circuit. This case is in the 8th Circuit. Moreover, the alleged conflict simply does not exist; the decisions of all the Courts of Appeals are, essentially, in agreement on the interpretation of 52 (a). It happens but rarely, and then inadvertently by inexact expression, that a judge of a Court of Appeals strikes a discordant note in the great symphony of uniform construction of that rule.

In searching for the meaning of that portion of 52 (a) that treats of appellate review of fact findings, there is encountered a wealth of authority—not a dearth thereof as contended by petitioner. A leading case is *U. S. v. U. S. Gypsum Company*, 333 U. S. 364, 394, 395, 68 S. Ct. 525, 92 L. ed. 746, 765, 766, where this Court, construing and applying 52 (a), said:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.' It was intended, in all actions tried

> upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the Appellate Court. Findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Thus, this Court not only stated the test to be applied in determining whether findings were "clearly erroneous" but also stated the source of the rule and explained its underlying theory. It is that exposition of the rationale or basis of the rule that accommodates some special and sound limitations or exceptions to which petitioner apparently cannot become reconciled. For instance, in the Gypsum case this Court said, 333 U. S. l. c. 396, 92 L. ed. l. c. 766—

> "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."

In *Republic Pictures Corporation* v. *Rogers*, (9th Cir.) 213 F. 2d 662, it was decided that in ascertaining whether contracts were ambiguous and in interpreting contracts, the Court of Appeals was not bound by the trial court's findings, since such matters were questions of law. In *Brown* v. *Cowden Live Stock Company*, (9th Cir.) 187 F. 2d 1015, it was held that where the trial court's findings were as to the effect of certain transactions rather than findings which resolve disputed facts, the Court of Appeals was not obstructed by the traditional rule not to disturb the trial court's findings of fact but was free to make its own determination as to the legal conclusion to be drawn. In

Smallfield v. *Home Insurance Company*, (9th Cir.) 244 F. 2d 337, cited by petitioner, the Court recognized the rule that findings of fact induced by an error of law are not binding. To the same effect is *Allis Chalmers Mfg. Co.* v. *Wichman*, (8th Cir.) 220 F. 2d 426, where it was held that the rule that a reviewing court will not disturb findings of fact unless they are clearly erroneous does not apply if the trial judge has committed an error of law which has manifestly influenced or controlled his findings of fact.

That the 8th Circuit has not abandoned Rule 52 (a) is demonstrated by *Wilson* v. *New York Life Insurance Company*, 250 F. 2d 649, which was argued in the Court of Appeals the same day and before the same judges as the instant case and in which the Court said (l. c. 651) "The findings of the Court are presumptively correct and will not be set aside unless clearly erroneous." It would be difficult to find a rule more widely applied or more uniformly construed than this one, as demonstrated by decisions too numerous to mention in all the judicial circuits. The 9th Circuit, which petitioner contends is handing down decisions conflicting with those of other circuits, actually is very much in line. As the Court of Appeals for that circuit tersely, but adequately, observed, in *Wells* v. *J. C. Penney Company*, 250 F. 2d 221, 225, "The trial below having been by the District Court without a jury findings of fact should not be set aside unless clearly erroneous."

In *Randall Foundation* v. *Riddell*, 244 F. 2d 803 (9th Cir.), cited by petitioner, the Court simply invoked Rule 52 (a) and, obviously, did not deem the trial court's findings of fact "clearly erroneous". In that case, as indicated by excerpt from the opinion at page 13 of the petition, the Court rejected the appellant's argument that it must "disregard" the findings of the trial court. Of course, such findings must always be considered or regarded, not dis-

regarded, in order for the Court of Appeals to determine whether they are to be accepted or set aside, according to the well established rules.

Even if there is a conflict of decisions with respect to Rule 52 (a) (which respondent denies) the instant case is not an exemplification of it. The question or issue presented to the Court of Appeals in this case was one of law (construction of employment contract) or one of mixed law and fact (construction coupled with practical application of the contract). If the district court's fixing of the additional fee under the contract were regarded as purely a finding of fact (which it is not) the Court of Appeals obviously deemed it clearly erroneous, as it was empowered to do without being obliged to label it as such. The Court's use of the words "clearly erroneous" is not required by law or rule; when those words are employed it usually is for the purpose of invoking Rule 52 (a) as justification for declining to set aside a finding of fact. What the petition really amounts to is a complaint that the Court of Appeals did not laboriously turn out a lengthy and tedious disquisition on the meaning and operation of Rule 52 (a) in its relation to findings of fact. But that portion of the rule is so generally and well understood and so uniformly construed that it need not even be mentioned. Moreover, petitioner assumes but has failed to demonstrate that the Court of Appeals did set aside any fact finding that was eligible for the "clearly erroneous" test.

Petitioner, at page 15 of the petition, quotes and attaches great significance to certain language employed by the Court of Appeals, and says it was used with reference to a question of fact. What escapes petitioner is that the Court, as clearly indicated by the words "applying the limitations and criteria of the contract" (petition, appendix 7a), referred to a question of law, or perhaps mixed law

and fact, not a question of fact; and that the Court said "determinable", not "determined", giving rise to the inescapable inference that the actual determination somehow went off on something other than the "informed judgment of the experienced judge, applying the limitations and criteria of the contract" and was induced, no doubt, by erroneous conclusions of law, namely, misinterpretation and misapplication of the contract, for when the Court of Appeals considered the "matters the contract required to be considered" (petition appendix 8a) it reached a quite different conclusion. What the Court of Appeals rejected appears to be anything but a finding of fact within the ambit of 52 (a). If it was not purely a conclusion of law, it might be regarded as mixed law and fact, or a finding induced by an erroneous conclusion of law. Finally, if the reviewing Court needed to find it "clearly erroneous" it obviously did so, in view of its very drastic modification of the trial court's judgment.

As already noted, petitioner complains of the setting aside of District Court's findings of fact and of new fact findings made by the Court of Appeals, but does not identify any of them. It is apparent from stipulated and agreed facts embodied in the pre-trial order (R. 12-14) that the decision of the Court of Appeals could be, and presumably was, based on and justified by essential facts that were uncontroverted, and that it did not ne essarily involve the setting aside of any fact finding of the type properly embraced by Rule 52 (a), much less the making of any new finding of fact. However, if this Court deems it necessary, in order to rule on the petition for certiorari, to determine more precisely what points the Court of Appeals was called upon to review, in particular the fact findings questioned on appeal, and which fact findings if any of the 52 (a) variety that Court was obliged to, or might have, set aside

in order to decide those points or to reach its decision, respondent respectfully urges the Court to call for and peruse the briefs that were filed in the Court of Appeals. In that connection, the Court of Appeals observed (petition, appendix 6a): "It is contended for the client that the court erred in interpreting and applying the employment contract * * *" Then, relative to the proper amount of the fee increase, the Court said (page 8a): "We hold, on consideration of the matters the contract required to be considered, that amount is and should be declared to be the sum of $6,000."

ALLEGED DEPARTURE FROM NORMAL PROCEDURE.

From what has already been said, it is quite clear that the Court of Appeals did not make any new findings of fact of the Rule 52 (a) type—so there is nothing to petitioner's contention that it did so.

It is fundamental and elementary in our system of jurisprudence that an appellate court may reverse or modify the judgment of a lower court. It follows that in the accepted and usual course of judicial proceedings the Federal District Court will, or should, be guided by the rules and principles of law laid down by the Court of Appeals for its circuit, not inconsistent with decisions of this Court. But in this case both petitioner and the District Court saw fit to ignore a decision of the Court of Appeals for the 8th Circuit containing enunciations that were very much in point and of controlling significance, namely, *20th Century-Fox Film Corporation* v. *Brookside Theatre Corporation*, 194 F. 2d 846. In that case, an anti-trust suit like the Carter case against substantially the same defendants, William G. Boatright and his alter ego, Nick C. Spanos, petitioner here, as

attorneys for plaintiff were allowed a fee of $150,000.00 by the trial court. The Court of Appeals pared it down to $100,000.00, for all services including a lengthy trial and the appeal, and in doing so said, l. c. 859:

> "The statute provides for the recovery of 'reasonable' attorney fees. Such fees are not to be calculated on the basis of a contingent fee. But even if so calculated, 40% of the amount of the verdict in this case would, in our opinion, if to be paid out of the amount of damages recovered, shock the conscience * * *"

When the instant case came before the Court of Appeals, involving the same attorneys and the same type of suit, the Court decided it consistently with what it had said (and of which the attorneys were so well aware) in Brookside. That can hardly be regarded as a departure from the accepted and usual course of judicial proceedings. It is nothing more than the exercise of power conferred by *28 U. S. C. A. 2106.*

While complaining of alleged departure from proper procedure, petitioner undertakes, at page 16 of the petition, to argue this case on the merits by contending that "trial" as occurring in paragraph 3 of the contract (R. 17) includes pre-trial (despite its prefix meaning "before", and the ordinary sense of the word "trial"). There is much respondent could say on that subject, but it would appear to be out of place on this occasion.

In much the same vein are the questions or "propositions" propounded by petitioner at pages 3 and 4 of the petition, which appear to be either moot or to go to the merits.

CONCLUSION.

There is no conflict of decisions between the Courts of Appeals such as that for which petitioner contends. If respondent is mistaken in this, the conflict is insignificant, not "real and embarrassing". *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 79, 99 L. Ed. 897, 904, 75 S. Ct. 614. There is nothing in this case to indicate the Court of Appeals engaged in or sanctioned any departure from the accepted and usual course of judicial proceedings. The alleged conflict and departure are figments of petitioner's imagination or, more likely, hollow devices conceived in frustration, mantled with speciosity and launched in desperation. Petitioner conjures this Court to conjure up a phantom conflict or departure by which to justify its review of this case, in the hope that somehow this Court might then be persuaded to relieve the attorneys from the extreme disappointment and embarrassment begotten them by the ill-conceived and exorbitant demand they made upon their client. The petition is frivolous. Its filing was utterly unjustified. Wherefore, respondent prays reasonable damages for the delay thereby occasioned him. *Rule* 564.

Respectfully submitted,

GILBERT CARTER, Trustee,
223½ West Cherry Street,
Nevada, Missouri,
Respondent.